A

SUPERINTENDENT OF LAND & SURVEYS MIRI DIVISION & ANOR

v.

B

MADELI SALLEH

FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF FCJ
ARIFIN ZAKARIA FCJ
AZMEL MAAMOR FCJ
C [CIVIL APPEAL NO: 01-1-2006 (Q)]
8 OCTOBER 2007

NATIVE LAW AND CUSTOM: *Land dispute - Customary rights over land - Claim for - Whether rights of natives to occupy untitled land*
D *in accordance with customary laws subsist in area reserved for operations of Sarawak Shell Oilfields Limited pursuant to Rajah Order (No. XXIX of 1921) - Common law position - Whether native customary rights first given recognition in Sarawak under s. 66 Land Settlement Ordinance 1933 - Whether claim made out*

E

LAND LAW: *Customary land - Native rights - Claim for - Whether rights of natives to occupy untitled land in accordance with customary laws subsist in area reserved for operations of Sarawak Shell Oilfields Limited pursuant to Rajah Order (No. XXIX of 1921) - Common law*
F *position - Whether native customary rights first given recognition in Sarawak under s. 66 Land Settlement Ordinance 1933 - Whether claim made out*

The respondent brought this action seeking declarations, *inter alia*, that he was at all material times a licensee under native customary
G rights of all that parcel of land, measuring approximately six acres in area, situated at Miri/Pujut Road and forming part of Lot 660 Block 8 Miri Concession Land District ('said land'), and that the act of the appellants declaring the said land as a park and later developing it into a school constituted a wrongful interference with
H the respondent's enjoyment of his native customary rights. The respondent's case was premised on the fact that for many years prior to 1 January 1958, his father and later himself had acquired and exercised native customary rights over the said land by clearing, occupying and planting rubber trees and then fruit trees.
I Thus, the respondent's claim was rooted on long and continuous occupation of the said land. The second appellant, by Gazette notification dated 24 December 1982, declared the said land to be

a Government reserve for the purpose of a park and later developed it into a school. The respondent alleged that the second appellant's said act without prior extinguishment of the respondent's native customary rights and payment of compensation was wrong in law, and constituted wrongful interference with his rights and enjoyment of the said land. The learned Judicial Commissioner dismissed the respondent's claim but upon appeal to the Court of Appeal, that finding was reversed and the respondent's claim accordingly allowed.

In the present appeal by the appellants against the Court of Appeal's decision, this court, at the leave stage, had allowed the following six questions to be posed: (i) Whether rights of natives to occupy untitled land in accordance with customary laws could have subsisted or would have been lost or extinguished in the area reserved for the operations of the Sarawak Shell Oilfields Limited pursuant to the Rajah Order (No. XXIX of 1921) ('1921 Order'); (ii) whether it is legally correct to state that native customary rights were first given recognition in Sarawak under s. 66 of the Land Settlement Ordinance 1933 ('Ordinance') in the light of the Land Regulations – Order No. VIII 1920 ('1920 Regulations'), the 1931 Order and 1933 Order, the Land (Classification) Ordinance 1948 and the Land Code (Cap 81) (Sarawak); (iii) whether the words "the law in force immediately prior to the 1st day of January 1958" in proviso (ii) of s. 5(2) of the Land Code (Cap 81) (Sarawak) include the 1920 Regulations which were repealed by the Order No. L-2 (Land) 1931 or any other Order of Rajah, affecting land, which was not in force immediately prior to 1 January 1958; (iv) having regard to the Land (Classification) Ordinance 1948 (a law in force immediately prior to 1 January 1958), whether native customary rights as defined by s. 66 of the Ordinance (which was in force immediately prior to 1 January 1958) could have been created or exercised in any area excepted from the Shell Concession Area; (v) whether having regard to the provisions of s. 3(1) and 6 of the Civil Law Act 1956, and the relevant Federal, State and customary laws in Malaysia, and particularly in Sarawak, which regulate the creation, exercise, loss, abandonment and extinguishment of native rights over land, the Court of Appeal in this instant case, and indeed, the courts in Malaysia generally, could rely on the cases of *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* and *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors*; and (vi) whether the confession and avoidance in one paragraph of the defence

A continue to operate or have been negated where the facts said to have been confessed or admitted are specifically traversed or denied in other paragraphs of the same defence, and the issues to be tried as agreed by the parties include "whether, by virtue it was an ex-Shell Concession Area, no native customary right could B be created or acquired by the plaintiff".

Held (dismissing the appeal)
Per Arifin Zakaria FCJ delivering the judgment of the court:

C **(1)** The proposition of law as enunciated in the two cases of *Adong Kuwau (supra)* and *Nor Anak Nyawai (supra)* reflected the common law position with regard to native titles throughout the Commonwealth. And it was held by Brennan J, Mason CJ and McHugh J, concurring, in the Australian case of *Mabo (No. 2)* that by the common law, the Crown may D acquire a radical title or ultimate title to the land but the Crown did not thereby acquire beneficial ownership of the land. The Crown's right or interest is subject to any native rights over such land. They adopted the view of the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria*, where the E Privy Council in an appeal from the Supreme Court of Nigeria held that radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is head. That F usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes. Although the instant case dealt with individual rights and not communal rights, the principle G applicable was the same. *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (foll); *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* (foll); *Mabo (No. 2)* (foll); *Amodu Tijani v. Secretary, Southern Nigeria* (foll). (paras 22 & 23)

H **(2)** Native holdings are not only recognized by the 1920 Regulations, but where possible, such holdings may even be registered. Registration, however, is not a necessary prerequisite for such holdings to be recognized. In the light of this, it was erroneous to hold, as was held by the learned I Judicial Commissioner in the present case, that native customary rights in Sarawak were only created by s. 66 of the Ordinance. What s. 66 purported to do was to stipulate new

conditions before native customary rights could be recognized after the coming into force of the Ordinance. It does not purport to nullify native customary rights that had been acquired or recognized prior to the coming into force of the Ordinance. In other words, it has no retrospective force. The respondent's claim in this case arose from circumstances which occurred prior to the Ordinance, since his father and his forefather had been in occupation of the said land prior to 1922. It was not in dispute that the respondent was born on the said land in 1922. Even though the respondent admitted that he left the said land before the house on the said land was gutted by fire in 1941, he maintained that he returned to the said land regularly to attend to the fruit trees. He claimed he did so on a monthly basis. The respondent's testimony in this regard went unchallenged. This was further fortified by the evidence of an employee of the Jabatan Kerja Raya who visited the said land as late as 1975 and confirmed that there were fruit trees and rubber trees on the said land. A letter dated 26 March 1982 addressed to the 1st appellant from the Head of the Malay Community in Miri in support of the respondent's application for title to the said land confirmed that the respondent's father was in occupation of the said land before it came under the Shell Concession Area. (para 28)

(3) On the issue of what is meant by "occupation", actual physical presence is not necessary. There can be occupation without physical presence on the land provided there exists sufficient measure of control to prevent strangers from interfering. Therefore, the fact that the respondent ceased to live on the said land prior to the fire which gutted the house on the said land in 1941 did not mean that he ceased to be in occupation of the said land. The evidence before the court clearly established that he continued to exercise control over the said land after the said period. The respondent could not, therefore, be said to have lost his right or interest over the said land by reason of abandonment or non-occupation of the said land. *Newcastle City Council v. Royal Newcastle Hospital* (foll); *Hamit Matusin & ors v. Superintendent of Lands & Surveys & Anor* (foll). (para 29)

(4) There is no provision in the 1921 Order seeking to extinguish the respondent's right over the said land. All it did was to reserve the specified area of Miri District for the purpose of the operation of the Sarawak Shell Oilfields Limited. Reading

A the 1921 Order, the effect of the reservation is merely to reserve a specified area for the purpose of the operations of the Sarawak Shell Oilfields Limited. Future use of the land so reserved is governed by the 1921 Order, but it did not go further to provide that land which is already in occupation by
B natives under the customary laws ceased to have effect and continued occupation of the land by the natives shall become illegal. In the absence of such a provision in the 1921 Order, the 1921 Order could not be construed to have the effect of extinguishing the rights of the native over such land which
C had been in existence prior to the coming into force of the 1921 Order. Such a drastic measure needs to be expressed in clear language and cannot be derived by mere implication. (para 34)

D **(5)** Also, to construe the 1921 Order in the manner proposed by the appellants would give it a retrospective force. This is so because the respondent had been in occupation of the said land long before the 1921 Order. It is an established principle of statutory construction that *prima facie* a statute should not
E be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. The 1921 Order did not seek to do so. The provisions of reg. 2, if at all, are only applicable to future occupation of the land in the reserved area but not to the existing occupiers.
F In short, the reservation under the 1921 Order is subject to all existing rights under the native customs of land tenure. It was too far reaching a consequence to construe the 1921 Order to have the effect of extinguishing all existing rights that had been in existence before the coming of James Brooke. The
G 1921 Order did not expressly say so. (para 35)

(6) It was not disputed that even though the said land came to be reserved for the operation of the Sarawak Shell Oilfields Limited, it was never taken possession of by the Sarawak Shell
H Oilfields Limited for their purposes. The respondent continued to be in occupation of the said land until it was declared by Gazette notification dated 24 December 1982 as land reserved for the purpose of a park, which was later developed into a school. In the circumstances, the reservation of the said land
I under the 1921 Order did not have the effect of extinguishing the rights of the respondent over the said land. *Mabo (No. 2)* (foll); *Udin Anak Lampon v. Tuai Rumah Utom* (dist). (para 39)

(7) Therefore, the answer to question (i) would be that the rights of natives to occupy untitled land in accordance with customary laws subsisted in the area reserved for the operations of Sarawak Shell Oilfields Limited pursuant to the 1921 Order. As for question (v), this court wholly agreed with the view expressed in *Adong Kuwau (supra)* and *Nor Anak Nyawai (supra)* that common law respects the pre-existence of rights under native laws or customs. In view of what was said in considering questions (i) and (v), it necessarily followed that the answer to question (ii) would be in the negative. Further, in light of the stand taken on questions (i), (ii) and (v), questions (iii), (iv) and (vi) would not be dealt with. (paras 41, 42, 43 & 44)

Bahasa Malaysia *Translation Of Headnotes*

Responden memulakan tindakan ini bagi memohon deklarasi, antara lain, bahawa beliau adalah pada semua masa material pemegang lesen di bawah hak adat anak negeri kepada sebidang tanah, kira-kira seluas enam ekar, yang terletak di Jalan Miri/Pujat, yang menjadi sebahagian Lot 660 Block 8 Tanah Konsesi Daerah Miri ('tanah tersebut'), dan bahawa tindakan perayu-perayu mengisytiharkan tanah tersebut sebagai sebuah taman dan kemudian membangunkan sebuah sekolah di situ adalah satu gangguan salah terhadap kepenggunaan hak adat anak negerinya. Kes responden adalah diasas kepada fakta bahawa untuk beberapa tahun sebelum 1 Januari 1958, bapanya dan kemudian beliau sendiri telah mengambil milik tanah tersebut dan melaksanakan hak adat anak negeri ke atasnya dengan cara menebang tebas tanah tersebut, mendudukinya dan menanam pokok-pokok getah dan buah-buahan di situ. Jelasnya, tuntutan responden adalah berasaskan kepada pendudukan yang lama dan berterusan ke atas tanah tersebut. Perayu kedua, melalui pemberitahuan Gazet bertarikh 24 Disember 1982, telah mengisytiharkan tanah tersebut sebagai rizab Kerajaan bagi maksud sebuah taman dan kemudian membangunkannya kepada sebuah sekolah. Responden mengatakan bahawa tindakan perayu kedua tersebut tanpa terlebih dahulu membatalkan hak adat anak negeri beliau serta tanpa membayar pampasan adalah salah di sisi undang-undang, sekaligus merupakan satu gangguan salah terhadap haknya untuk menduduki dan mengguna tanah tersebut. Yang arif Pesuruhjaya Kehakiman menolak tuntutan responden, tetapi atas rayuan, Mahkamah Rayuan telah mengakas dapatan tersebut dan membenarkan tuntutan responden.

A Dalam rayuan semasa oleh perayu-perayu terhadap keputusan Mahkamah Rayuan, mahkamah ini, di peringkat permohonan kebenaran, telah membenarkan enam soalan berikut dikemukakan: (i) sama ada hak-hak anak negeri untuk menduduki tanah tak bermilik menurut undang-undang adat boleh terus wujud atau akan
B terhapus di dalam kawasan yang dirizabkan untuk operasi Sarawak Shell Oilfields Limited di bawah Perintah Rajah (No. XXIX tahun 1921) ('Perintah 1921'); (ii) sama ada ianya betul untuk menyatakan bahawa hak-hak adat anak negeri mula diberi pengiktirafan di Sarawak di bawah s. 66 Ordinan Penempatan
C Tanah 1933 ('Ordinan') di mengambilkira Peraturan-peraturan Tanah – Perintah No. VIII 1920 ('Peraturan-peraturan 1920'), Perintah 1931 dan Perintah 1933, Ordinan Tanah (Penjenisan) 1948 dan Kanun Tanah (Cap 81) (Sarawak); (iii) sama ada perkataan-perkataan "undang-undang yang berkuatkuasa sebelum 1
D Januari 1958" di dalam proviso (ii) s. 5(2) Kanun Tanah (Cap 81) (Sarawak) adalah termasuk Peraturan-peratuan 1920 yang dimansuhkan oleh Perintah No. L-2 (Tanah) 1931 atau mana-mana Perintah Rajah yang lain, yang berkaitan dengan tanah, yang tidak berkuatkuasa sebelum 1 Januari 1958; (iv) mengambilkira
E Ordinan Tanah (Penjenisan) 1948 (suatu undang-undang yang berkuatkuasa sebelum 1 Januari 1958), sama ada hak adat anak negeri seperti yang ditakrif oleh s. 66 Ordinan (yang berkuatkuasa sebelum 1 Januari 1958) boleh digubal atau dilaksanakan di mana-mana kawasan kecuali di Kawasan Konsesi Shell; (v) sama ada
F mengambilkira peruntukan-peruntukan s. 3(1) dan 6 Akta Undang-Undang Sivil 1956, dan undang-undang Persekutuan dan Negeri serta undang-undang adat yang relevan di Malaysia, dan terutamanya di Sarawak, yang mengawalselia pembuatan, pelaksanaan, peninggalan dan penghapusan hak-hak anak negeri ke
G atas tanah, Mahkamah Rayuan dalam kes semasa, dan malah mahkamah-mahkamah di Malaysia amnya, boleh bergantung kepada kes-kes *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* dan *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors*; dan (vi) sama ada pengakuan dan pengelakan yang terdapat di
H dalam satu perenggan pembelaan boleh terus beroperasi atau menjadi tersangkal di mana fakta-fakta yang dikatakan diakui tersebut telah ditolak atau disangkal dengan secara spesifik di dalam perenggan-perenggan lain pembelaan yang sama, dan isu-isu yang perlu dibicarakan seperti yang dipersetujui oleh pihak-pihak
I termasuk juga "sama ada, disebabkan ia adalah bekas Kawasan Konsesi Shell, tiada hak anak negeri boleh diwujudkan atau diperolehi oleh plaintif".

Diputuskan (menolak rayuan)
Oleh Arifin Zakaria HMP menyampaikan penghakiman mahkamah:

(1) Anjuran undang-undang seperti yang dikatakan di dalam dua kes *Adong Kuwau (supra)* dan *Nor Anak Nyawai (supra)* mencerminkan posisi common law berhubung dengan hakmilik-hakmilik anak negeri di seluruh Komanwel. Dan ianya diputuskan oleh Brennan J, Mason CJ dan McHugh J, menyetujui, di dalam kes Australia *Mabo (No. 2)* bahawa melalui common law, Raja Pemerintah boleh memperolehi hakmilik radikal atau hakmilik akhir kepada tanah, tetapi tidaklah dengan cara itu memperoleh milikan benefisial ke atas tanah tersebut. Hak atau kepentingan Raja Pemerintah adalah tertakluk kepada hak-hak anak negeri terhadap tanah tersebut. Mereka menggunapakai pandangan Majlis Privi di dalam *Amodu Tijani v. Secretary, Southern Nigeria*, di mana Majlis Privi di dalam rayuan dari Mahkamah Agong Nigeria memutuskan bahawa hakmilik radikal ke atas tanah yang dipegang oleh 'White Cap Chiefs of Lagos' adalah terletak pada Raja Pemerintah, namun hakmilik penuh 'usufructuary' terletak pada seorang ketua bagi pihak masyarakat yang dia menjadi ketuanya. Hakmilik usufructuary itu tidak terjejas oleh penyerahan kepada Raja Britain pada tahun 1861; sistem pemberian oleh Raja Pemerintah hendaklah dianggap sebagai diperkenalkan, secara pentingnya, jika tidakpun secara ekslusif, untuk maksud-maksud pemindahhakkan. Walaupun kes semasa menangani kes hak-hak individu dan tidak hak-hak komuniti, prinsip yang sama adalah terpakai. *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* (diikuti); *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* (diikuti); *Mabo (No. 2)* (diikuti); *Amodu Tijani v. Secretary, Southern Nigeria* (diikuti).

(2) Pegangan anak negeri bukan sahaja diiktiraf oleh Peraturan-peraturan 1920, tetapi dimana mungkin, pegangan-pegangan sedemikian boleh juga didaftarkan. Pendaftaran, bagaimanapun, bukanlah satu syarat duluan untuk pegangan sedemikian diiktiraf. Mengambilkira semua ini, adalah salah untuk merumuskan, sepertimana yang dirumuskan oleh yang arif Pesuruhjaya Kehakiman dalam kes semasa, bahawa hak-hak adat anak negeri di Sarawak hanya diwujudkan oleh s. 66 Ordinan. Apa yang hendak dibuat oleh s. 66 adalah membentangkan syarat-syarat baru sebelum hak-hak adat anak negeri boleh diiktiraf selepas Ordinan mula berkuatkuasa. Ia

A tidak berhasrat untuk membatalkan hak-hak adat anak negeri yang telah diperolehi atau diiktiraf sebelum Ordinan mula berkuatkuasa. Dengan kata lain, ia tidak mempunyai kuatkuasa retrospektif. Tuntutan responden di dalam kes ini wujud dari keadaan yang berbangkit sebelum Ordinan, kerana bapa dan
B nenek moyangnya telah menduduki tanah tersebut sebelum 1922. Adalah tidak dipertikai bahawa responden telah dilahirkan di tanah tersebut pada tahun 1922. Walaupun responden mengakui bahawa beliau telah meninggalkan tanah tersebut sebelum rumah di atas tanah tersebut terbakar pada
C tahun 1941, beliau berkata bahawa beliau kerap kembali ke situ untuk melihat pokok-pokok buah-buahannya. Beliau berkata beliau malah berbuat begitu setiap bulan. Tiada cabaran kepada testimoni responden mengenai perkara ini. Ia diperkuatkan dengan keterangan seorang pekerja Jabatan Kerja
D Raya yang melawat tanah tersebut selewat tahun 1975 yang mengesahkan bahawa terdapat pokok-pokok buah-buahan dan pokok-pokok getah di tanah tersebut. Sekeping surat bertarikh 26 Mac 1982 yang dialamatkan kepada perayu pertama dari Ketua Masyarakat Melayu di Miri yang menyokong
E permohonan responden untuk hakmilik tanah tersebut mengesahkan bahawa bapa responden telah menduduki tanah tersebut sebelum ia berada di bawah Kawasan Konsesi Shell.

(3) Berhubung isu apa yang dimaksudkan dengan "pendudukan",
F kehadiran fizikal sebenar adalah tidak perlu. Pendudukan boleh berlaku walaupun tanpa kehadiran fizikal di atas tanah dengan syarat wujud kawalan-kawalan yang mencukupi bagi menghalang orang luar dari mencerobohi. Oleh itu, fakta bahawa responden tidak lagi tinggal di tanah tersebut sebelum
G kebakaran yang menghanguskan rumah di atas tanah tersebut pada tahun 1941 tidak bermakna bahawa beliau tidak lagi menduduki tanah tersebut. Keterangan di hadapan mahkamah jelas menunjukkan bahawa beliau terus mempunyai kawalan terhadap tanah tersebut selepas tempoh berkenaan.
H Responden, dengan itu, tidak boleh dikatakan sebagai telah kehilangan hak-hak atau kepentingan terhadap tanah tersebut kerana meninggalkannya atau kerana tidak menduduki tanah tersebut. *Newcastle City Council v. Royal Newcastle Hospital* (diikuti); *Hamit Matusin & ors v. Superintendent of Lands and*
I *Surveys & Anor* (diikuti).

(4) Tidak ada peruntukan di dalam Perintah 1921 yang boleh menghapuskan hak responden terhadap tanah tersebut. Apa yang ia lakukan adalah merizabkan kawasan khusus di dalam Daerah Miri untuk maksud operasi Sarawak Shell Oilfields Limited. Membaca Perintah 1921, kesannya hanyalah untuk merizabkan suatu kawasan tertentu bagi operasi Sarawak Shell Oilfields Limited. Penggunaan masa depan tanah adalah dikawal oleh Perintah 1921, tetapi ia tidak sampai memperuntukkan bahawa tanah yang sudahpun diduduki oleh anak-anak negeri di bawah undang-undang adat sudah tidak mempunyai kesan atau bahawa pendudukan berterusan anak-anak negeri di situ menjadi tak sah. Dalam ketiadaan peruntukan sedemikian di dalam Perintah 1921, Perintah 1921 tidak boleh ditafsirkan sebagai memberi kesan menghapuskan hak-hak anak negeri terhadap tanah-tanah tersebut yang wujud sejak sebelum Perintah 1921 berkuatkuasa. Kesan drastik sebegini mesti diungkap dengan bahasa yang jelas dan tidak boleh ditafsir melalui implikasi semata-mata.

(5) Selain itu, mentafsir Perintah 1921 seperti yang dicadangkan oleh perayu-perayu akan memberinya kuatkuasa retrospektif. Ini kerana responden telahpun menduduki tanah tersebut lama sebelum Perintah 1921. Sudah menjadi prinsip pentafsiran undang-undang yang mantap bahawa *prima facie* sesuatu statut tidak boleh ditafsir secara retrospektif yang boleh menjejaskan hak-hak atau obligasi semasa yang wujud, kecuali tafsiran sedemikian tidak boleh dielakkan berdasarkan perbahasaan yang digunakan. Perintah 1921 tidak bermaksud berbuat demikian. Peruntukan di peraturan 2, jikapun boleh dikata mempunyai hasrat itu, hanya terpakai kepada pendudukan masa depan tanah di dalam kawasan yang dirizab dan tidak terhadap penghuni-penghuni semasa. Pendeknya, penrizaban di bawah Perintah 1921 adalah tertakluk kepada semua hak-hak semasa yang wujud di bawah adat-adat pendudukan tanah anak negeri. Adalah sesuatu yang terlalu jauh untuk mentafsir Perintah 1921 sebagai mempunyai kesan menghapuskan semua hak-hak semasa yang wujud yang sudahpun wujud sebelum kedatangan James Brook lagi. Perintah 1921 tidak menyatakan demikian secara jelas.

(6) Adalah tidak dipertikai bahawa walaupun tanah tersebut telah dirizab untuk operasi Sarawak Shell Oilfields Limited, ia tidak pernah diambil milikan oleh Sarawak Shell Oilfields Limited bagi kegunaan mereka. Responden terus menduduki tanah tersebut

A sehinggalah ianya diisytihar melalui pemberitahuan Gazet bertarikh 24 Disember 1982 sebagai tanah yang dirizab bagi maksud sebuah taman, yang kemudian dibangunkan kepada sebuah sekolah. Dalam keadaan sedemikian, penrizaban tanah tersebut di bawah Perintah 1921 tidak mempunyai kesan
B menghapuskan hak-hak responden ke atas tanah tersebut. *Mabo (No. 2)* (diikuti); *Udin Anak Lampon v. Tuai Rumah Utom* (dibezakan).

(7) Oleh yang demikian, jawapan kepada soalan (i) adalah bahawa
C hak-hak anak negeri untuk menduduki tanah yang tidak bermilik menurut undang-undang adat masih berterusan di dalam kawasan yang dirizabkan untuk operasi Sarawak Shell Oilfields Limited di bawah Perintah 1921. Berhubung soalan (v), mahkamah ini bersetuju sepenuhnya dengan pandangan yang
D dinyatakan di dalam *Adong Kuwau (supra)* dan *Nor Anak Nyawai (supra)* bahawa common law menghormati kewujudan terdahulu hak-hak di bawah undang-undang anak negeri atau adat. Berdasarkan apa yang dikata semasa menimbangkan soalan-soalan (i) dan (v), ianya mengikut bahawa jawapan
E kepada soalan (ii) adalah negatif. Selanjutnya, mengambilkira pendirian-pendirian yang diambil mengenai soalan-soalan (i), (ii) dan (v), soalan-soalan (iii), (iv) dan (vi) tidak akan dijawab.

Case(s) referred to:

F *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 3 CLJ 885 HC* ***(foll)***

Amodu Tijani v. Secretary, Southern Nigeria [1921] 2 AC 399 ***(foll)***

Hamit Matusin & Ors v. Superintendent of Lands & Surveys & Anor [1991] 2 CLJ 1524; [1991] 2 CLJ (Rep) 677 HC ***(foll)***

G *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA* ***(refd)***

Lee Gee Lam v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1993] 4 CLJ 155 HC ***(refd)***

Mabo & Others v. State of Queensland [1992] 107 ALR 1 ***(foll)***

MBf Holdings Berhad & Anor v. Houng Hai Kong & Ors [1994] 4 CLJ 1002 HC ***(refd)***

H *Newcastle City Council v. Royal Newcastle Hospital [1959] 1 All ER 734* ***(foll)***

Ngan Tuck Seng & Anor v. Ngan Yin Groundnut Factory Sdn Bhd [1999] 3 CLJ 26 HC ***(refd)***

Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 HC ***(foll)***

I *Oyekan & Ors v. Adele [1957] 2 All ER 785* ***(refd)***

Raphael Pura v. Insas Bhd & Ors [2003] 1 CLJ 61 FC ***(refd)***

Sugar Refining Co v. Melbourne Harbour Trust Commissioners [1927] AC 343 ***(refd)***
Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors & Another Appeal [2005] 3 CLJ 555 CA ***(refd)***
Udin Lampon v. Tuai Rumah Utom [1949] SCR 3 ***(dist)***
Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 PC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3(1)(c), 6
Courts of Judicature Act 1964, s. 96(a)
Federal Constitution, arts. 13, 162
Land Code (Cap. 81) (Sarawak), s. 5(2)(i), (7)
Land Regulations – Order No. VIII 1920, ss. 3, 22, 30
Land Settlement Ordinance 1933, s. 66
Rajah Order (No. XXIX of 1921), regs. 2, 4

Other source(s) referred to:
AF Porter, *The Development of Land Administration in Sarawak from the Rule of Rajah Brooke to the Present Time (1841-1965)*, p 18
James Brooke's Journal, vol I, p 210

For the appellant - Datuk JC Fong, State Attorney General Sarawak (Thomas Akin Jelimin, SSLO & Kezianorella Ram Dato' Mat Nor, SLO with him); State Attorney-General's Chambers
For the respondent - Mekanda Singh Sandhu (Satinder Singh Sandhu with him) M/s Sandhu & Co

[Appeal from Court of Appeal, Kuching; Civil Appeal No: Q-01-94-00]

Reported by Suresh Nathan

JUDGMENT

Arifin Zakaria FCJ:

Preliminary Objection

[1] By notice dated 2 November 2006, the learned counsel for the respondent gave notice of preliminary objection that leave to appeal ought not to have been given in respect of questions (i) to (vi), or alternatively, this court should decline to answer these questions because they do not fall within the ambit of s. 96(a), Courts of Judicature Act 1964 (CJA) on the grounds stated in the notice. In this regard we are in agreement with the view expressed by Abdul Hamid Mohamad, JCA (as he then was) in *Raphael Pura v. Insas Bhd & Ors* [2003] 1 CLJ 61 where in delivering the majority judgment he stated at p. 96.

A The first question that arises from this submission is whether, the leave having been granted by this court and now that this court (this panel) is constituted to hear the appeal, this court (this panel) should allow the respondents to re-open the issue whether the leave should have been granted or not.

B Generally speaking, it should not. The issue has been decided by this court. It is *res judicata.* A party should not be given a second bite of the cherry. A new panel of this court should not be reversing the decision of the earlier panel of the same court. There should be consistency in the judgment of the court.

C However, where the granting of the leave is challenged on the ground of lack of jurisdiction, this court has held that the granting of the leave to appeal to this court may still be challenged even at the hearing of the appeal.

D **[2]** We are of the considered view that the issue of jurisdiction has been sufficiently dealt with by this court at the leave stage, therefore, we do not propose to revisit the issue. For those reasons we dismissed the preliminary objection with costs. We then proceeded to hear the appeal proper and having heard E arguments of both parties we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.

The Claim

F **[3]** The respondent (plaintiff in the court below), Salleh bin Kilong, brought this action seeking declarations, *inter alia*, that the respondent was at all material times a licensee under native customary rights of all that parcel of land situate at Miri/Pujut Road, measuring approximately 6.00 acres in area, and forming G part of Lot 660 Block 8 Miri Concession Land District, (the said land); and that the act of the appellants (defendants in the court below) to declare the said land as a park and later develope it into a school constitutes a wrongful interference with the respondent's enjoyments of his native customary rights. Salleh bin H Kilong had passed away before the appeal was heard by the Court of Appeal and had been substituted by his son, Madeli bin Salleh, who is also the administrator of his estate.

[4] The respondent's pleaded case is as follows: For many years I prior to 1 January 1958, his father and later himself had acquired and exercised native customary rights over the said land by clearing, occupying and planting rubber trees and later fruit trees.

Thus the respondent's claim is rooted on long and continuous occupation of the said land. The second appellant by Gazette notification dated 24 December 1982 declared the said land to be a Government reserve for the purpose of a park and later it was developed into a school. The respondent alleged that the said act of the second appellant without prior extinguishment of the respondent's native customary rights and payment of compensation was wrong in law and constituted wrongful interference with his rights and enjoyment of the said land.

[5] In their defence the appellants contended, *inter alia*, (a) that the respondent had not acquired native customary rights over the said land as the said land was an ex-Shell Concession Area and as such no customary rights is capable of being created thereon; (b) that following from (a) the extinguishment of the respondent's customary rights does not arise; (c) that the gazette notification of 24 December 1982 was proof of the fact that the said land being a Government reserve for the purpose of a park; (d) that the development of the said land into a school was proper and in accordance with law; (e) that the declaration of the said land as a Government reserve is not in breach of natural justice nor in violation of art. 13 of the Federal Constitution; and (f) that the second appellant had not lost its rights and title to the said land or such rights and title had not been extinguished by reason of the respondent's occupation and/or possession of the said land.

The Agreed Issues Before The High Court

[6] Before the High Court the parties agreed that the issue of liability be tried first. The parties also agreed on the issues to be tried, which are as follows:

(a) was the land claimed by the respondent as his native customary rights land as described in para. 3 of the statement of claim an ex-Shell Concession Area;

(b) whether, by virtue of the fact that it was an ex-Shell Concession Area, no native customary rights could be created or acquired by the plaintiff; and

(c) was there any need for the second appellant to extinguish the respondent's native customary rights over the said land and to pay compensation before declaring the said land to be a Government reserve for a park or developing it into a school.

[7] The learned counsel for the respondent admitted in his submission before the High Court that the said land fell within the Shell Concession Area. That settles issue (a). Two issues remained to be determined by the court.

Finding Of The Learned Judicial Commissioner

[8] Briefly the finding of the learned Judicial Commissioner on those issues are as follows:

(a) It is not disputed that the said land is situated in that area of land which was reserved for the operation of the Sarawak Shell Oilfields Limited pursuant to the Rajah Order made on 15 November 1921 ("the 1921 Order"). The 1921 Order also provided for the notification of the occupiers of the land under permit that the land so occupied belongs to the Government and that they will only be entitled to be compensated in respect of building erected or plant planted thereon. In other words the rights of the holders of the permit are not attached to the land;

(b) That the land became an excepted area not earlier than 1954. The said land was within the Shell Concession Area for the period beginning from 1921 and ending at the earliest in 1954;

(c) That the areas of land reserved for Sarawak Shell Oilfields Limited falls within the definition of the "State Land" as defined in the Land Code, which means all land for which no document of title has been issued;

(d) That from s. 5(2)(i) of the Land Code, the only inference that can be made is that native customary rights may be acquired or created only over the state land;

(e) That by virtue of s. 5(7) of the Land Code, being a state land the onus is on the plaintiff to prove that he occupied the said land under a permit;

(f) That the plaintiff has failed to adduce any evidence whatsoever that he occupied the said land under permit for the period it was reserved as a Shell Concession Area. The plaintiff was, therefore, in unlawful occupation of state land during the period in which it was reserved for Sarawak Shell Oils Limited; and

(g) The plaintiff has not acquired any customary rights over the said land to require any right to be extinguished or to entitle the plaintiff to any compensation.

[9] On the above findings the learned Judicial Commissioner dismissed the respondent's claim.

Finding Of The Court Of Appeal

[10] On appeal to the Court of Appeal, the finding of the learned Judicial Commissioner was reversed and the respondent's claim was accordingly allowed. The reasons for their finding may be summarized as follows:

(a) The Judicial Commissioner clearly accepted that the appellants had adopted a plea of confession and avoidance. However, he erred in law when he failed to appreciate that once he found that the appellants had failed to discharge their burden of proving the facts relied on by them to avoid the legal consequences of their admission of the respondent's claim, the respondent became entitled to judgment. The respondent became entitled to judgment as the appellants were bound by their admission which meant that at the very least, during the years beginning from 1954 until 1 January 1958, when the said land was no longer reserved as Shell Concession Area, the respondent had acquired native customary rights to the said land;

(b) Once the appellants became bound by their admission that the respondent had acquired native customary rights over the disputed land prior to 1 January 1958 which by implication included the period commencing 1954 to 1 January 1958, it was no longer open to the Judicial Commissioner to consider whether the respondent had acquired any native customary rights between 1954 and 1 January 1958. The Judicial Commissioner had clearly misdirected himself when he did so;

(c) The Judicial Commissioner had further erred when he found that the respondent had moved out from the said land before the house on it was destroyed by fire in 1941 and that there was no evidence that the respondent had acquired native customary rights by means of s. 5(2) of the Land Code. The first finding was in error since the Judicial Commissioner had ignored the respondent's evidence that even after the house had been destroyed by fire in 1941, fruit trees were still on

A the land and the respondent continued to visit the land once a month. Actual physical presence need not be equated with occupation. Just because the respondent did not live on the land did not mean he was no longer in control of it or did not occupy it. With regard to the second reason, it was a
B misdirection to apply s. 5(2) of the Land Code since the methods specified in s. 5(2) applied to the creation of native customary rights from 1 January 1958. On the facts, the issue before the court was whether such rights had been created or acquired between 1954 and 1 January 1958. Proviso (ii) to
C s. 5(2) of the Land Code expressly directs that such issue should be determined by the law in force immediately prior to 1 January 1958; and

(d) On the facts, the Judicial Commissioner had also erred when
D he found that the respondent had not acquired native customary rights to the said land before it became part of the Shell Concession Area in 1921. The finding of the Judicial Commissioner that the respondent was in unlawful occupation of state land whilst it was part of the Shell Concession Area
E could not be supported.

The Appeal

[11] Against that finding of the Court of Appeal the appellants appeal to this court.

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[12] At the leave stage this court had allowed six questions to be posed for the decision of this court which read as follows:

1. Whether rights of natives to occupy untitled land in
G accordance with customary laws could have subsisted or would have been lost or extinguished in the area reserved for the operations of the Sarawak Oilfields Limited pursuant to Order No. XXIX. 1921 made by the Rajah.

2. Whether it is legally correct to state that native customary
H rights were first given recognition in Sarawak under s. 66 of the Land Settlement Ordinance, 1933 in the light of the Land Regulations – Order No. VIII, 1920 ("the 1920 Regulations"), the 1931 Order and 1933 Order, the Land (Classification) Ordinance 1948 and the Land Code 1958 (Cap. 81).

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3. Whether the words "the law in force immediately prior to the 1 January 1958" in proviso (ii) of s. 5(2) of the Land Code (Cap. 81) of Sarawak include the 1920 Regulations which

were repealed by the Order No. L-2 (Land) 1931 or any other Order of Rajah, affecting land, which was not in force immediately prior to 1 January 1958. A

4. Having regard to the Land (Classification) Ordinance 1948 (a law in force immediately prior to 1 January 1958) whether native customary rights as defined by s. 66 of the Land Settlement Ordinance (which was in force immediately prior to 1 January 1958) could have been created or exercised in any area excepted from the Shell Concession Area (ie, ex-Shell Concession Area as pleaded in para. 3 of the defence). B C

5. Whether having regard to the provisions of s. 3(1) and 6 of the Civil Law Act 1956 (Act 67), and the relevant Federal, State and customary laws in Malaysia, and particularly in Sarawak, which regulate the creation, exercise, loss, abandonment and extinguishment of native rights over land; the Court of Appeal in this instant case, and indeed, the courts in Malaysia generally, could rely on: D

   (i) *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 CLJ 885 E

   (ii) *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn. Bhd. & Ors* [2001] 2 CLJ 769

   which were decisions based upon: F

   (i) the Australian case of *Mabo (No. 2)* which is "an authority for the proposition that the common law of Australia recognizes a form of native titles"; and

   (ii) the Canadian case of *Calder v. AV of British Columbia* which held that "common law categorically recognized native rights over land". G

6. Whether the confession and avoidance in one paragraph of the defence continues to operate or have been negated where: H

   (i) the facts said to have been confessed or admitted are specifically traversed or denied in other paragraphs of the same defence; and

   (ii) the issues to be tried as agreed by the parties includes "whether, by virtue it was an ex-Shell Concession Area, no native customary right could be created or acquired by the plaintiff." I

A

Questions 1 And 5

[13] These two questions are inextricably related and for that reason we shall deal with them together.

B

[14] In addressing the issues raised here, the starting point would be to determine when, if any, native customary rights over land was first given recognition. The respondent's counsel contended that the native customary rights had been in existence prior to the coming into force of the 1921 Order.

C

[15] It is the respondent's contention that prior to Brooke Rules in Sarawak there was already in existence pre-existing customary laws concerning land. As noted by A.F. Porter in his book - *"The Development of Land Administration in Sarawak from the Rule of Rajah Brooke to the Present Time (1841-1965)"* at p. 18, which reads:

D

> At the time of James Brooke's arrival in Sarawak there had for centuries been in existence in Borneo and throughout the eastern archipelago a system of land tenure originating in and supported by customary law. This body of custom is known by the generic term 'Indonesian adat'. Within Sarawak the term 'adat', without
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> qualification, is used to describe this body of customary rules or laws; the English equivalent is usually 'native customary law' or native customary rights.

[16] The same passage was referred to by the High Court in *Nor*

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Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn. Bhd. & Ors [2001] 2 CLJ 769. As observed by the learned judge in the said case even James Brooke himself had as far back as in 1840 given recognition to such rights. This is evident from the following passage:

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> The fruit trees about the Kampong, and as far as the jungle round, are private property, and all other trees which are in any way useful, such as the bamboo, various kinds for making bark-cloth, the bitter kony … and many others. Land, likewise, is individual property, and descends from father to son; so, likewise,
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> is the fishing of particular rivers, and indeed most other things …

(See *James Brooke's Journal,* Vol. I, p. 210 – *Borneo and Celebes,* as reproduced by Anthony Porter, p. 19).

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[17] The CA in *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors. and Another Appeal* [2005] 3 CLJ 555 endorsed the view of the learned judge in relation to native customary rights in that the common law respects the pre-

existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation. By common law the Court Appeal must be referring to the English common law as applicable to Sarawak by virtue of s. 3(1)(c), Civil Law Act 1956. In this regard it should be emphasized that the common law is not a mere precedence for the purposes of making a judicial decision. It is a substantive law which has the same force and effect as written law. It comes within the term of "existing law" under art. 162 of the Federal Constitution. (See *MBF Holdings Berhad & Anor. v. Houng Hai Kong & Ors.* [1994] 4 CLJ 1002 (HC: Anuar J); Judicially considered in: *Lee Gee Lam v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1993] 4 CLJ 155 (HC: Vincent Ng JC); *Ngan Tuck Seng & Anor v. Ngan Yin Groundnut Factory Sdn Bhd* [1999] 3 CLJ 26 (HC: Clement Skinner JC))

[18] It is a correct general statement of the common law that the courts will assume that the Crown intends that rights of property of the inhabitants are to be fully respected: per Deane and Goudron JJ in *Mabo and Others v. State of Queensland* [1992]107 ALR 1 *(Mabo No. 2)*. In *Oyekan and Others v. Adele* [1957] 2 All ER 785, in an appeal from the judgment of the Supreme Court of Nigeria, Lord Denning sitting in the Privy Council stated the common law position as follows:

> In inquiring, however, what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law: see *Amodu Tijani v. Southern Nigeria (Secretary)* (3) [1921] 2 AC 399), *Sakariyawo Oshodi v. Moriamo Dakolo* (4) [1930] AC 667). Furthermore, if a dispute arises between the inhabitants as to the right to occupy a piece of land, it will be determined according to native law and custom, without importing English conceptions of property law: see *Sunmonu v. Disu Raphael* (5) [1927] AC 881), *Idewu Inasa v. Sakariyawo Oshodi* (6) [1934] AC 99); except, of course, in those cases, now growing in number, where English conceptions of individual ownership have superseded previous conceptions.

[19] Similarly in *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169, the CA at p. 182 stated:

> So far as authority is concerned, there is *Amodu Tijani* to which the judge referred. There is also the decision of *Adong bin Kuwau & Ors. v. Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 where this court upheld a finding by the High Court that aborigines had rights at common law over land vested in the State and that such rights existed despite the 1954 Act.

[20] *Adong* was affirmed by the Federal Court but no reasoned judgment was given. The case of *Kerajaan Negeri Selangor & Ors. v. Sagong Tasi & Ors* is now pending before this court.

[21] The learned State Attorney General vehemently contended that *Adong* and *Nor Anak Nyawai* should not be followed because they were decisions rooted upon the Australian case of *Mabo (No. 2)*, an authority for the proposition that the common law of Australia which recognizes a form of "native titles" and the Canadian case of *Calder v. AG of British Columbia* which held that the "common law categorically recognized native rights over land".

[22] With respect, we are of the view that the proposition of law as enunciated in these two cases reflected the common law position with regard to native titles throughout the Commonwealth. And it was held by Brennan J, Mason CJ and McHugh J, concurring, in *Mabo (No. 2)* that by the common law, the Crown may acquire a radical title or ultimate title to the land but the Crown did not thereby acquire absolute beneficial ownership of the land. The Crown's right or interest is subject to any native rights over such land. They adopted the view of the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 AC 399, where the Privy Council in an appeal from the Supreme Court of Nigeria held that the radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes. At p. 407 Viscount Haldane observed:

> In the light afforded by the narrative, it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. In the case of *Oduntan Onisiwo v. Attorney-General of Southern Nigeria* (2),

> decided by the Supreme Court of the colony in 1912, Osbourne CJ laid down as regards the effect of the cession of 1861, that he was of the opinion that "the ownership rights of private landowners, including the families of the Idejos, were left entirely unimpaired, and as freely exercisable after the Cession as before." In this view their Lordships concur. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are *prima facie* to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing. No doubt questions of difficulty may arise in individual instances as to the effect in law of the terms of particular documents. But when the broad question is raised as to what is meant by the provision in the Public Lands Ordinance of 1903, that where the lands to be taken are the property of a native community, the head chief may sell and convey it, the answer must be that he is to convey a full native title of usufruct, and that adequate compensation for what is so conveyed must be awarded for distribution among the members of the community entitled, for apportionment as the Native Council of the District, with the sanction of the Governor, may determine. The chief is only the agent through whom the transaction is to take place, and he is to be dealt with as representing not only his own but the other interests affected.

[23] We are conscious of the fact that in this case we are dealing with individual right not communal right, but in our view the principle applicable is the same.

[24] What was then the adat law commonly practice by the native at the time of the arrival of James Brooke. This is reflected in the Rajah's Order IX of 1875 which made specific reference to the common practice among native community to make clearings of old jungle and afterwards abandoning them. The said Order reads:

> Whereas it is a common practice among the native community to make large clearings of old jungle and afterwards abandon them, I hereby direct that should any clearance of the kind be made in future, and the persons who cleared the ground allow the same to go uncared for, they will lose all claim or title to such land; and should any one be desirous of making gardens thereon, they will be permitted to become squatters; and notice is hereby given that should the original clearers try by any means to molest any such squatters they will render themselves liable to be fined at the

A rate of $10 (ten dollars) per hundred fathoms square for all the land they may have cleared, they having destroyed useful jungle produce, such as firewood, rattans etc, for no purpose.

[25] The order gave warning to clearers that they may "lose all claim or title to such land" (emphasis added) if the persons who cleared the land allowed the land to go uncared for. The order in no uncertain terms speaks of "claim or title to such land" that had been cleared. This goes to show that as early as 1875 the Rajah had already given due recognition to native rights over land.

[26] This is further reinforced by Rajah's Order No. VIII, 1920 (Land Order 1920). Section 22 gives recognition to native holdings in accordance with customary laws and where possible such claim to land shall be registered. Section 30 provides for compensation to be paid should the Government resumes possession of any occupied land for any purpose. In s. 3 of the Land Order 1920, it is provided that State Land is divided into four classes:

(a) Town Suburban Lands

(b) Country Lands of 100 acres and over

(c) Country Lands of under 100 acres

(d) Native holdings

[27] Section 22 of the same provides as follows:

> 22. (i) Under this part lands may be occupied by Natives free of all charges for the cultivation of fruit trees, padi, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws provided that where possible claims to fruit groves and farming lands shall be registered. Records of such claims shall be kept by all Native Headman and also in the Land Office in each district.
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> (ii) A certificate in the form of Schedule A. of Notification No. .... of 1920 may be issued to registered land holders under this part.

[28] It is to be observed that native holdings is not only recognized by the Land Order 1920, but where possible, such holdings may even be registered. Registration however, is not a necessary prerequisite for such holdings to be recognized. In the light of the above it is erroneous to hold as was held by the learned Judicial Commissioner in the present case that native

customary rights in Sarawak was only created by s. 66 by the Land Settlement Ordinance Cap. 27. We are of the view that what s. 66 purported to do was to stipulate new conditions before native customary rights could be recognized after the coming into force of the said Ordinance. It does not purport to nullify native customary rights which had been acquired or recognized prior to the coming into force of the said Ordinance. In other words it has no retrospective force. The respondent's claim in this case arose from circumstances which occurred prior to the said Ordinance, since his father and his forefather had been in occupation of the said land prior to 1922. It is not in dispute that the respondent was born on the said land in 1922. Even though the respondent admitted that he left the said land before the house on the said land was gutted by fire in 1941, but he maintained that he returned to the said land regularly to attend to the fruits trees. He claimed, he did so, on a monthly basis. The respondent's testimony in this regard went unchallenged. This is further fortified by the evidence of PW3 the Jabatan Kerja Raya employee who visited the said land as late as 1975. He confirmed that there were fruit trees and rubber trees on the said land. The letter dated 26 March 1982 addressed to the 1st appellant from Temenggong Haji Munip bin Tabib, the Head of the Malay Community in Miri in support of the respondent's application for title to the said land confirmed that the respondent's father Kilong bin Dullah was in occupation of the said land before it came under Shell Concession Area.

[29] On the issue of what is meant by "occupation", we agree with the view of the Court of Appeal that actual physical presence is not necessary. There can be occupation without physical presence on the land provided there exist sufficient measure of control to prevent strangers from interfering: See *Newcastle City Council v. Royal Newcastle Hospital* [1959] 1 All ER 734; which was followed by the local case of *Hamit Matusin & Ors. v. Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524; [1991] 2 CLJ (Rep) 677. Therefore, following the above authorities, the fact that the respondent ceased to live on the land prior to the fire which gutted the house on the land in 1941 that does not mean that he ceased to be in occupation of the said land. The evidence before the court clearly established that he continued to exercise control over the said land after the said period. The respondent could not, therefore, be said to have lost his right or interest over the said land by reason of abandonment or non occupation of the said land.

[30] At this juncture it is appropriate to consider the effect of the 1921 Order *vis a vis* the respondent's rights or interest over the said land.

[31] The 1921 Order reserved certain specified area in the Miri District for the operation of the Sarawak Oilfields Limited. It is common ground that the said land fell within the said concession area (the Shell Concession Area). For ease of reference we reproduce below the 1921 Order.

Order No. XXIX, 1921.

Regulations for issue of Land Permits in Miri District

1. The area of land in Miri District which is bounded approximately by a line commencing at Tanjong Lobang and thence proceeding inland along the northern eastern side of the Miri hills to the confluence of the Sungei Dalam and the Miri River thence along the bank of that river to and so as to include Lutong and thence along the seashore to Tanjong Lobang is with the exception of such parts thereof as are already dedicated to Government or public purposes reserved for the operation of the Sarawak Oilfield Limited.

   Note. – A map showing the area so reserved may be inspected at the Government Office, Miri.

2. Notice is hereby given that no person may erect any building of a permanent nature or plant up any land within the area so reserved without having obtained a permit for the purpose.

3. No such permit may be issued unless (a) the Government Officer to whom application for the same is made is satisfied after reference to the General Manager of Sarawak Oilfields Limited that the issue of the permit will not interfere with the operations of that Company or (b) the General approves of the permit being issued.

4. All persons occupying land under permit are reminded that the land so occupied belongs to the Government and in the event of the same being required such persons may only claim compensation for any buildings erected or products planted on the land in accordance with the terms of the permit.

November 15th, 1921.

[32] The learned State Attorney-General submitted that the Court of Appeal failed to consider the legal effect of the 1921 Order. He contended that by the 1921 Order, native customary rights enjoyed by the respondent, if any, prior to the 1921 Order had been lost or extinguished. He gave two reasons in support of his contention.

[33] Firstly, the learned State Attorney-General argued that by the 1921 Order the said land became reserved land for the operation of the Sarawak Oilfields Limited. This means to say that the respondent no longer have control over the said land. The Sarawak Oilfields Limited was given a free hand to operate on the said land if it so desire. The respondent could not in law resist such a move. Under the 1921 Order it was further provided that no person may erect any building of permanent nature or plant up any land within the reserved area without having obtained a permit for the purpose. Regulations 4 of the 1921 Order also provides that all lands occupied under permit belong to the Government and in the event of the same being required the person occupying such lands may only claim compensation for any buildings erected or products planted on the land. The respondent here did not have such a permit. Therefore, the respondent has no right whatsoever over the said land.

[34] Let us consider the first point. It is not in dispute that the said land fell within the Shell Concession Area. But the real issue is; what is the legal effect of the 1921 Order on native customary rights over land falling within the Shell Concession Area which had been acquired or exercised prior to the 1921 Order. Does the 1921 Order have the effect of extinguishing those rights? The Court of Appeal relying on *Sugar Refining Co. v. Melbourne Harbour Trust Commissioners* [1927] AC 343 adopted the rule of statutory interpretation that 'a statute should not be held to take away rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms.' In this regard we agree with the Court of Appeal that there is no provision in the 1921 Order seeking to extinguish the respondent's right over the said land. All it did was to reserve the specified area of Miri District for the purpose of the operation of the Sarawak Oilfields Limited. What then is the effect of the said "reservation". Reading the 1921 Order we are of the view that its effect is merely to reserve a specified area for the purpose of the operations of the Sarawak Oilfields Limited. Future use of the land so reserved are governed by the said Order, but it did not go further to provide

A that land which are already in occupation by native under the customary laws ceased to have effect and continued occupation of the land by the natives shall become illegal. In the absence of such a provision in the 1921 Order, we agree with the Court of Appeal that the Order could not be construed to have the effect
B of extinguishing the rights of the native over such land which had been in existence prior to the coming into force of the said Order. Such a drastic measure needs to be expressed in clear language and cannot be derived by mere implication.

C **[35]** We are also of the view that to construe the 1921 Order in the manner proposed by the appellants would give the Order a retrospective force. This is so because the respondent had been in occupation of the said land long before the 1921 Order. It is an established principle of construction of statute that *prima facie*
D a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language use: See *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56. We find the 1921 Order did not seek to do so. As we see it, the provisions of reg.
E 2 if at all is only applicable to future occupation of the land in the reserved area but not to the existing occupiers. In short we would venture to say that the reservation under the 1921 Order is subject to all existing rights under the native customs of land tenure. We hold that it is too far reaching a consequence to
F construe the 1921 Order to have the effect of extinguishing all existing rights that had been in existence before the coming of James Brooke. The 1921 Order did not expressly say so.

[36] The other issue, advanced by the appellants was that
G whatever "native rights" the respondent may have acquired prior to the 1921 Order was lost because by virtue of the 1921 Order he ceased to have control over the said land. The appellants' argument may briefly be stated as follows. By virtue of the 1921 Order the said land came into the control of Sarawak Oilfields
H Limited, who is a non-native. In the circumstances, the appellants contended, the respondent's right over the said land is lost. The appellants sought to rely on the judgment of RY Hedges CJ in *Udin anak Lampon v. Tuai Rumah Utom* [1949] SCR 3 in support of the said contention. With respect to the learned State
I Attorney-General, we are unable to agree with him as the facts in the present case and that in *Udin anak Lampon* are totally divergent. In that case the native had by his own free will allowed the non-native to use the land in question, which is not the case

here. In the present case, the respondent continued to occupy the said land without interruption until it was gazetted as Government reserve in 1982.

[37] At no time did the respondent allow the Sarawak Oilfields Limited to use the said land.

[38] Further we are of the opinion that the 1921 Order merely reserved the lands within the designated area for the operation of the Sarawak Oilfields Limited, it does not vest the lands concerned on the Sarawak Oilfields Limited. The effect of trust or reservation for a public purpose was considered by Brennan J in *Mabo No. (2)*. In that case he observed as follows:

> Where the Crown grants land in trust or reserves and dedicates land for a public purpose, the question whether the Crown has revealed a clear and plain intention to extinguish native title will sometimes be a question of fact, sometimes a question of law and sometimes a mixed question of fact and law. Thus, if a reservation is made for a public purpose other than for the benefit of the indigenous inhabitants, a right to continued enjoyment of native title may be consistent with the specified purpose – at lease for a time – and native title will not be extinguished. But if the land is used and occupied for the public purpose and the manner of occupation is inconsistent with the continued enjoyment of native title, native title will be extinguished. A reservation of land for future use as a school, a courthouse or a public office will not by itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native title which would thereby be extinguished. But where the Crown has not granted interests in land or reserved and dedicated land inconsistently with the right to continued enjoyment of native title by the indigenous inhabitants, native title survives and is legally enforceable.

[39] We are of the view that the above observation is applicable to our present case. It is not in dispute that even though the said land came to be reserved for the operation of the Sarawak Oilfields it was never taken possession of by the Sarawak Oilfields for their purposes. The respondent continued to be in occupation of the said land until it was declared by gazette notification dated 24 December 1982 as land reserved for the purpose of a park, which was later developed into a school. In the circumstances we are of the view that the reservation of the land under the 1921 Order does not have the effect of extinguishing the rights of the respondent over the said land.

[40] For the above reasons we agree with the finding of the Court of Appeal that the 1921 Order did not provide for the resumption of the native customary rights land or the extinguishment of such rights.

[41] Therefore, our answer to the first question would be that the rights of native to occupy untitled land in accordance with customary laws subsisted in the area reserved for the operations of Sarawak Oilfields pursuant to the 1921 Order.

[42] As for the fifth question our answer is that we wholly agree with the view expressed in *Adong bin Kuwau* and *Nor ak Nyawai* that the common law respects the pre-existence of rights under native laws or customs.

That disposed of questions 1 and 5.

Question 2

[43] In view of what we have said above in considering questions (1) and (5), it necessarily follows that our answer to question (2) would be in the negative.

Questions 3, 4 And 6

[44] In view of the stand we have taken on questions 1, 2 and 5 we do not propose to deal with questions 3, 4 and 6.

Conclusion

[45] In the upshot we dismissed the appeal herein with costs. We order that this case be remitted to the High Court for assessment of damages.